The Rights of Parents

Martin Guggenheim*

The subject of "parental rights" has been profoundly shaped by the Constitution of the United States. Neither the word "parent" nor "child," however, appears anywhere in the Constitution. Despite this, the Supreme Court of the United States has consistently and vigorously protected parental rights through the application of constitutional principles. Indeed, it has characterized the rights to conceive and to raise one's children as "essential," "basic civil rights of man," and "rights far more precious . . . than property rights." The Court considers "the interest of parents in the care, custody, and control of their children" to be "perhaps the oldest of the fundamental liberty interests recognized by this Court." In the Court's language, a parent's legal interest in his or her child is "established beyond debate as an enduring American tradition."[1]

The topic of parents' legal rights is far more an inquiry into the political structure of a community than may seem apparent; it is inextricably bound up with the limits of state power. It is impossible to answer the most basic questions about parents' rights without engaging in political inquiry. Some have attempted to justify parents' rights in terms as part of "natural law." The theory advances that individuals preexisted the state's formation. In coming together to form government, there were certain rights that individuals brought with them which are beyond the control of state officials. One of these is the right to form a family and beget children.[2] Under this reasoning, family formation is pre-political and, therefore, beyond the state's authority to control.

---

* Excerpted from Martin Guggenheim, What's Wrong With Children's Rights (Harvard University Press 2005).

The Supreme Court has, on occasion, relied on this reasoning,[3] which closely resembles Jean Rousseau's theory that individuals entered into a implied contract with government when they formed the modern state and that certain aspects of individual freedom remained outside of the contract and not ordinarily subject to governmental restriction.[4]

Since, according to Rousseau, this form of government depends on the consent of the governed, only those rights individuals intended to submit to government authority are properly within that authority to regulate. Locke developed similar ideas, arguing that many natural rights of men and women, including the parental power to raise children, are beyond government's power to invade.[5]

But natural law theory has a troubling quality of circularity in its reasoning; things are as they are because God wants it that way, because it always has been that way, or because it's the right way to do things. The reasoning works for those persuaded by it; but it does little to convince skeptics. Even Rousseau's or Locke's theories, although helpful as a device to get us started, only suggest that some basic human conditions begin outside the state's business.

Additional explanations are helpful, particularly because parental rights have come to be regarded in American constitutional law as among the most protected and cherished of all constitutional rights. A wide range of explanations have been offered for the primacy of parental control in child rearing. Perhaps the most important is based on the relationship between citizen and state and the role of child rearing in developing and shaping the future generations of an informed citizenry.

Among the first principles of American law is that government exists to serve the will of the people. As a consequence, our special brand of constitutional democracy places significant

limits on the power of government to regulate speech. Consider the First Amendment's guarantee of freedom of speech. One can regard the right to freedom of speech as a basic right because of the degree to which it advances an individual's freedom to think and express oneself as he or she pleases. This is an important autonomy right in itself.

But one can also think of freedom of speech as the outcome of a rule that constrains government from restraining speech. Here the emphasis is not on the speaker's right, but on government's limitation. Where speech is seen as the means by which the will of the people is to be expressed, it is elemental that government ought to be prohibited from tinkering very much with speech. A society committed to maintaining a government that serves the will of the people will find it necessary to strictly limit the circumstances under which government may constrain speech. Any other result leaves too great a danger that government will prevent speakers from saying what those in positions of power in government don't want to hear. Once those in power control what is allowed in public debate, the people lose to capacity to create the government they want.

In addition, the less government is permitted to suppress speech the greater the range of ideas that can be expressed. An unregulated private marketplace of ideas, fosters pluralism in its best sense: free people are permitted to consider the widest range of possibilities about how to live their lives and to shape their society. Seen in these terms, free speech is basic to a society committed to democratic rule. It both restricts the government's capacity to silence speakers and forbids government from taking sides by preferring one idea over another.

A second fundamental tenet of American law that bears directly on the rules of parental rights is the extremely limited role assigned to government in the area of religion. The First

Amendment guarantees to citizens the free exercise of religion; it also prohibits government from establishing a religion. As a result, government is obliged to allow religion to flourish and also is forbidden under the American Constitution from preferring one religion over another.

This means, even if only by default, that parents are free to attempt to inculcate the parent's preferred religious beliefs in their children (including their disbeliefs, as well). This is not to ensure that children will grow up with a particular set of religious beliefs or even that they will share the belief system of their parents'. Even when children reject the teaching of their parents, however, their views are unavoidably shaped by, because they are defined in relation to, those teachings as opposed to the state's.

Why are these basic principles of American law pertinent to a discussion of allocating child rearing responsibility in the United States? Because child rearing involves considerably more than providing sustenance to infants and children. Much more happens when we raise children than feeding and clothing them and keeping them healthy. It is impossible to raise children without teaching them at the same time. Moreover, it is unthinkable to teach them anything without shaping their values and outlook on life. Everything that goes on in a household is fodder for learning. Well beyond speech and communication skills, we teach our children manners, and inculcate them with life-long values. And, of course, religion is something into which children are raised. Their outlook on religion and their understanding of their relationship to God will be based on how children are raised from infancy (and, consequently, by whom they are raised).

Since children by definition need to be raised somewhere, the first question child rearing allocation must address is who should decide where the children should be raised. If government

played a significant role in dispersing children at birth to the adults selected by government, there is a considerable risk that government would have entered the prohibited arena of participating in value inculcation in children. In a polity committed to the ideal of government serving the will of its people, it is unimaginable to conceive of children belonging to government. Quite the opposite. In such a polity, children must belong to the people for the theoretical political aspirations of self-control to have any meaningful chance to be realized. The best way to guard against government becoming too involved in shaping the ideas or religion of its citizens is to deregulate and privatize child rearing.

These principles mean that government must be sharply restricted in its capacity to oversee the circumstances under which children are being raised. Child rearing means forming the values, interests, ideas, and religious beliefs of the next generation. Unavoidably, it is a responsibility someone must undertake. Once the family is identified as the locus for this undertaking, we should expect American law to insist, as the Supreme Court has, that there is a "private realm of family life which the state cannot enter."[6] This realm is beyond the state's reach, consistent with American constitutional democracy, because children's value inculcation and religious training is something "the state can neither supply nor hinder."[7]

It is useful to explore some particular cases decided by the Supreme Court that established these rules. The context of the disputes settled by the Court provides helpful insight into the broader questions under discussion. The first two cases ever decided by the Court exploring the subject of parental constitutional rights arguably remain the most important. In developing the principles supporting the rights of parents to raise their children free from undue state interference the Court stressed each of the issues we have already touched upon.

The first was decided in 1923; the second in 1925. These cases raised deeply profound questions about the relationship between the child, the parent and the state. In the first case, *Meyer v. Nebraska*, the Court heard a challenge to a Nebraska law brought by a teacher of the German language.

The Supreme Court declared the law unconstitutional because, among other reasons, it violated a parent's liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. To buttress this conclusion, the Court said that these provisions encompassed the rights "to marry, establish a home, and bring up children," even though none of them is mentioned in the Constitution itself.[8] The Court rejected the claim that the state may play a primary role in child rearing (over the objection of parents) declaring that there is a "private realm of family life which the state cannot enter." Justice McReynolds, writing for the Court, reminded the reader that some societies were based on the understanding that the state was to play a primary childrearing role. Deliberately referencing an image anathema to many Americans, Justice McReynolds discussed Plato's vision of the Ideal Commonwealth which included that "no parent is to know his own child nor any child his parent." Instead, all children would be raised in barracks and their training and education would be left to "official guardians." About these ideas, he wrote:

> Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Two years later, in a decision with even greater repercussions, in *Pierce v. Society of Sisters*, the Court struck down an Oregon statute requiring children to attend public schools. The

Justices found that this statute unduly interfered with the right of parents to select private or parochial schools for their children and that it lacked a reasonable relation to any purpose within the competency of the state.[9]

The Court wrote:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[10]

Both the results and the Court's reasoning remain important today. Our society would be quite different if the state could control the details of a mandatory curriculum for all children. It would be even more different if all children were required to attend public schools. This is not to suggest the particular questions before the Court were easy, or even correctly decided. It may be instructive for some to learn that Oliver Wendell Holmes was one of two Justices who dissented in the German language case. In his view, it was within the legitimate reach of state power to regulate the details of a child's education to this extent.

These two cases have formed the foundation for constitutionally protected parental rights. Our future as a democracy depends on nurturing diversity of minds.[11] The legal system's insistence on private ordering of familial life ultimately guards against state control of its citizens. To prevent standardization of youth, parents have constitutionally protected rights "to direct the education and upbringing of their children."[12] Accordingly, government must allow parents wide latitude to raise children as the parents wish to raise them. Parents, not the state, must be the final arbiter of what subjects their children study. (A minimum required curriculum of reading, arithmetic and history is considered sufficiently content-neutral and necessary for the

maintenance of an educated and capable citizenry to be imposed on children even when parents are opposed to such instruction.) Even more basically, parents must be free to choose educators for their children who are unaffiliated with the state. Although the state may maintain a public school system for those parents who wish to send their children there, parents are free to use private education as an alternative.

In addition to political theory justifying the parental rights doctrine, the Constitution has been an important protector of an American's right to procreate and to marry. Although this subject, to the extent it includes a discussion of abortion, covers more controversial constitutional theory than we have thus far considered, a robust understanding of the constitutional pillars buttressing parental rights doctrine requires an examination of this topic.

One of the fundamental freedoms protected by the Constitution is the freedom to procreate. The Supreme Court's first excursion into the subject, however, was an infamous 1927 decision, *Buck v. Bell*, allowing the compulsory sterilization of an eighteen-year-old woman with a low IQ who had already given birth to one child. A Virginia statute authorized the forced sterilization of certain institutionalized persons to prevent the transmission of "imbelicity" to the next generation. Virginia sought to perform a "safe" procedure on Ms. Buck whom the Court variously called "feeble minded" or "mentally defective."

According to the Court, Buck's mother was "feeble-minded" as was the daughter to which she had given birth. Virginia asserted a right to prevent Ms. Buck from bearing additional children because the responsibility for raising her children would likely ultimately fall to the state and because allowing her to procreate freely would expose society to dangers it had a right to avoid. Reasoning that "three generations of imbeciles is enough," the Court upheld the law

because "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

The decision proved to be a favorite of the Nazis in the 1930s and '40s who relied upon it to support their use of government power to manipulate the gene pool for future generations. Thus, it was unsurprising that the Court changed its mind the next time it had the opportunity to rule on a state law seeking to sterilize a person over his or her objection. In 1942, proclaiming that procreation is "fundamental to the very existence and survival of the race" and "one of the basic civil rights of man," the Court held in *Skinner v. Oklahoma*, that an Oklahoma law which allowed the state to sterilize persons "convicted two or more times for crimes amounting to felonies involving moral turpitude," violated the Equal Protection Clause of the Fourteenth Amendment because it infringed upon the fundamental "right to have offspring."[13]

Ever since, the Court has advanced procreational rights of Americans. In a 1965 decision, *Griswold v. Connecticut*,[14] the Court used the opportunity to declare unconstitutional a Connecticut law which, though still on the books, had not been enforced for many years. The law barred the use and distribution of contraceptives, even for married persons. The Court ruled that the Constitution protects various kinds of intimate privacy and that the marriage relationship fell well within a zone of privacy which protected couples from virtually all governmental regulation. In a concurring opinion, Justice Goldberg wrote:

> The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.... The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry

> and raise a family are of similar order and magnitude as the fundamental rights specifically protected.[15]

Griswold's reasoning was broadly extended seven years later from a privacy right within a marriage to an individual's privacy right. In 1972, in *Eisenstadt v. Baird*,[16] the Court reasoned that because the marital privacy recognized in Griswold protects two independent and distinct individuals, this protection should apply equally to a single person. The Court announced that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Accordingly, the Court invalidated a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons.

Both *Griswold* and *Eisenstadt* were important foundational decisions for the Court's next, and most controversial, foray into the field of procreative rights. In 1973, the Court decided *Roe v. Wade*,[17] declaring for the first time that part of a woman's constitutional right to privacy (including the fundamental right whether or not to beget a child) includes the choice to terminate an unwanted pregnancy (at least in the early stages of the pregnancy). In *Roe*, the Court restricted state power to forbid abortions, holding that a woman's decision whether to bear a child is within the sphere of privacy "founded in the Fourteenth Amendment's concept of personal liberty." The Court noted that even though the word "privacy" cannot be found in the Constitution, a "guarantee of certain areas or zones of privacy" has been constitutionally recognized in connection with "activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." The next year, the Court invalidated a scheme of mandatory leaves for pregnant public school teachers because that scheme unnecessarily interfered with the

decision to raise a family declaring "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[18]

Though *Roe* has been attacked both within and outside the legal profession as wrongly decided, the Court has consistently upheld the core ruling in that case.[19] For our purposes, it is important to recognize that what is controversial about the decision is that it grants a priority to the privacy rights of women over what some believe to be the rights of other individual human beings. The controversy is not about the decision to give greater priority to the privacy rights of women at the expense of government power, though the decision clearly does that as well. The decision to terminate a pregnancy directly impacts the potential father (in the next chapter we will explore in greater detail the clash of interests between the mother and the father) and, of course, the decision impacts the potential child. To those who regard a fetus as a human life, not merely potential life, the abortion decision authorizes the destruction of individual lives in the name of advancing a woman's privacy. The law has never recognized a non-viable fetus as more than potential life and has refused to accept the religious position that human life is formed at the time of conception. But regardless of where one comes down on those questions, the line of cases that discuss the right to control procreation clearly place that right with the individuals whose procreation is in question, rather than with the government. *Griswold*, *Eisenstadt* and *Roe* do this in the context of affirming the right to choose not to have a child; the pregnant school teacher case does it in the context of affirming the right to have a child. Each is based on the principle that the state has a limited role in decisions about having children.

An additional constitutionally protected freedom Americans enjoy is the right to marry (at

least the right to marry someone of the opposite sex and only one person at a time). As late as 1967, sixteen states prohibited marriage between a white person and someone of a different race. In 1967, the Supreme Court decided *Loving v. Virginia*.[20] In that case, a white man married a black woman in the District of Columbia. When they returned to Virginia as husband and wife, they were indicted and charged with violating Virginia's antimiscegenation law. Convicted and sentenced to one year in jail, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. The Supreme Court unanimously reversed the conviction and declared the statute unconstitutional. In doing so, the Court stressed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."

The Court has also developed an important line of cases that protect a parent's right to keep or regain custody of their children. In a significant case decided in 1972, the Court heard an appeal by an unmarried father of three children whose custody was taken from him when their mother died. An Illinois statute automatically deprived unmarried fathers of the custody of their natural children on the death of the mother. Illinois defended the law on the grounds that, in most cases, the fathers of children born out of wedlock fail to maintain a significant presence in the children's lives.

In *Stanley v. Illinois*,[21] the father lived with his children and the mother for almost all of the children's lives. Nonetheless, Illinois claimed the power to take his children into the state's custody and provide the father with the right to come forward to show why returning custody of

his children to him would further their best interests. The Court declared the law unconstitutional holding that unless a parent is unfit, he has the constitutional right to the care and custody of his children. In addition, the Court held the state is barred from short cutting its procedural obligations by presuming the father's unfitness. Most important of all, the Court made clear it is was irrelevant that Mr. Stanley might be able to regain his children's custody by showing their best interests would be furthered if he obtained custody. Illinois had a legitimate interest in the well-being of Mr. Stanley's children, the Court said, *only* if Mr. Stanley were found by a court to be unfit. Illinois had the lawful power to charge him with unfitness. But it was unconstitutional to require Mr. Stanley to prove that his children deserved to be with him before such a showing of unfitness had been made.

Most recently, in 2000, the Supreme Court decided the so-called "grandparents' visitation case," *Troxel v. Granville*.[22] There are few constitutional protections that have received such similar support -- from the Supreme Court of the 1920s, an extremely conservative Court, the Court of the 1960s, an extremely liberal one, and today's Court (also conservative).

Troxel involved a challenge to a Washington statute that authorized courts to hear petitions by non-parents (including, but not limited to, grandparents) who wished to be permitted visitation. In that case, paternal grandparents sought court-ordered visitation of their grandchildren after the children's father died. The Court ruled that the decision awarding visitation to the grandparents over the mother's objection violated the mother's constitutional rights to control the details of her children's upbringing. Without declaring that petitions for visitation may never be brought or that courts may never award visitation over a parent's objection, the Court held that the Constitution required, at least, that courts give great weight to

the reasons the parent opposes such visitation and overrule the parent's choice only in limited circumstances. Justice O'Connor's opinion, which announced the judgment of the Court, began with the observation that "[t]he liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court," and that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

Closely related to the freedom to marry whomever one wants and to procreate according to each person's choice is the even broader freedom of an adult to live the life one chooses free from all arbitrary governmental restraint. As we have seen, there are important instrumental values advanced by the parents rights doctrine. But it would be wrong to end there. There are important freedom advancing interests which also are extremely valuable in and of themselves.

American constitutional law limits government's role in the affairs of its people for additional reasons than protecting against the danger of homogeneity of political or religious ideas. Pluralism is also valued for its own benefits. We are a society built on the principle of individual liberty and the right to live the kind of life one chooses, with as few restrictions placed in our path as necessary to ensure the maintenance of civil order. (We can, of course, disagree about what these proper limits are; indeed, our most contentious social debates are precisely about them.)

In 2003, for example, Justice Kennedy began his important opinion for the Supreme Court in *Lawrence v. Texas*, which declared unconstitutional a Texas sodomy statute, thereby making it unconstitutional any longer to punish individuals for engaging in consensual

homosexual conduct, with the ringing words:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief expression, and certain intimate conduct.[23]

In a society committed to maximizing freedom for individuals to live the life they choose (subject to Mill's limit that one's freedom ends when it harms another), it should be unsurprising that the freedom to procreate, to marry, and to rear children would be deeply cherished. Wholly apart from whatever other values it may serve to society, protecting a parent's rights is a vital freedom in and of itself.

Consider the importance individuals attach to their intimate associations. The right to bear and raise children is at the core of an adult's autonomy because it permits the adult the opportunity to choose the kind of life that makes the most sense for him- or herself. In the words law professor David Richards, "[c]hild rearing plays a special role in the adult individual's development. It 'is one of the ways in which many people fulfill and express their deepest values about how life is to be lived. To this extent, one's children are the test of one's life and aspirations.'"[24] Parental rights help construct and support "an aspect of human self-definition and moral choice."[25] This is because, for so many humans, our understanding of ourselves is based on our intimate relationships with others.[26]

The choice to bear children or to raise children, for many people, easily ranks as the most important in their lives. Given its importance to adults, "an attempt to imagine state interests that would justify governmental intrusions amounting to a practical prohibition on procreation and

childbearing takes us out of our own experience and into an imaginary world of Malthusian nightmare."[27]

American history experienced such a nightmare. The institution of slavery, with all of its horrors and inhumane treatment of human beings, provides an important opportunity to comprehend the implications of the loss of parental rights. Slavery involved considerably more than the loss of control of one's labor. Slaves also lost the control over propagation. Adult slaves were denied the most basic human right to raise their children as their own.[28] Being denied the right to marry, to be parents with legally recognized rights, and to keep children in their custody, slaves, and the children of slaves, were denied the basic moral right "to integrate the experience of their ancestors into their lives, to inform their understanding of social reality with the inherited meanings of their natural forebears, or to anchor the living present in any conscious community of memory."[29]

New York University law professor Peggy Davis has shown that in the immediate aftermath of the Civil War, federal legislators focused on the loss of family that slaves experienced and enacted the Thirteenth and Fourteenth Amendments in part to guarantee all citizens the freedom to form and maintain familial relations. In Davis's words, "[t]o think of family liberty as a guarantee offered in response to slavery's denials of natal connections is to understand it, not as an end in itself, but as a means to full personhood. People are not meant to be socialized to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialized and from which adults would bring different values to the democratic process."[30]

Finally, and closely related to these constitutional principles, it is also important to value

the labor and sacrifice associated with childbearing. Although this factor tends to emphasize a mother's right, the idea that a woman could be expected to experience the extraordinary intrusion in her body resulting from pregnancy and childbirth and then be obliged to give birth to babies in order to permit state officials to place them as they see fit is Orwellian. It would not only mean that children belong to the state but, even more basically, everyone does.

Parental Rights and Its Relationship to Children's Rights

Some supporters of the parental rights doctrine have felt obliged to justify traditional parental authority in terms of its benefits to children. The claim that the parental rights doctrine serves the interests of children begins close to the same place we began talking about parental rights. First, let us address the initial allocation issue.

For at least two reasons it might be said that children's interests are well served by the rule that birth parents are given first rights to rear their children above all other adults. First, the reasoning goes, parents are naturally more inclined and, thus, presumptively more motivated, to do well by their children than non-parents. Thus, Locke regarded a parent's natural emotions as the principal motivating force for parents to act in the best interests of their children. In his words, "the affection and tenderness God hath planted in the breasts of parents toward their children make it evident that this is not intended to be a severe, arbitrary government, but only for the help, and preservation, of their offspring."[31]

Thus, as a general presumption, parents are considered to be more likely to do what is best for their own children than are any other individuals. Under this reasoning, parents are predetermined to see to it that the needs of their children are met and, all things being equal, are more likely than others to do best for their children.[32] The Supreme Court has reasoned that the

"natural bonds of affection lead parents to act in the best interests of their children."[33] This argument differs from natural law theory (which is based on the metaphysical) because it is an empirical claim suggesting, at the least, that biological parents *tend* above others to be better caregivers for their children than anyone else. Despite this difference, the empirical claim has never been subjected to rigorous testing.

A second justification may fall prey to a similar defect. There is much to suggest that children want to be raised by their biological families and that they avoid a potential cost if they are. A significant percentage of adults who have been adopted feel the need to search for and locate their birth parents at some point in their lives. To the extent this reflects a natural need for children to know their biological roots, allocating children to their birth parents in the first instance avoids exposing children to the potential harm of never knowing them. In addition, many point to the stigma attached to children who are raised by someone other than their birth parents.

Despite the absence of any resolution in the continuing nature/nurture debate, it remains a reasonable hypothesis that, all things being equal, children are well served by a rule that presumes their birth parents ought to raise them. At the same time, none of this is proof that a universal law that all children are to be raised by non-biologically related "parents" would be harmful to children.

Moving past the question whether the rule that birth parents are entitled over others to raise their biological children serves children well, the remaining question is whether the rule that parents are free to raise their children as they see fit serves children well. Properly understood, the second is a corollary of the first.

As a consequence of the constitutional protections accorded parents, government has assumed a modest role in monitoring what happens within the family. Government gets to set the boundaries at the outer limits of what is acceptable parenting. Thus, laws protecting children from neglect and abuse, even at the hands of their parents, have come to be regarded as a proper exercise of the state's police power (regulating the conduct of citizens that has the potential to harm others). But, unless parents are found to be "unfit" in court proceedings charging them with abuse or neglect, parental childrearing decisions are virtually immune from state oversight.

The classic alternative to a "fitness" standard (which limits state authority to overrule parental childrearing choices) is the child's "best interests" standard (which permits state officials to overrule such choices whenever the official disagrees with the original choice). The question then becomes are children better served by a rule that limits state officials in their authority to oversee parental childrearing or that expands such state power?

An important goal of any society is to develop healthy adults with a strong sense of self-esteem. Children need, and greatly benefit from, a sense of security that deserves prominent protection.[34] By making it difficult for state officials to intrude in the family and remove children from their parents' custody, the parental rights doctrine helps cement a child's sense of security. Children gain an important comfort knowing that they always will be connected -- emotionally, socially, and through physical custody -- to their parents and that their relationship will not lightly be destroyed. A child's important sense of belonging to another deserves protection.

Seen this way, the doctrine involves far more than my right to call my children my own. It allows my children to call me theirs. When parental rights are re-characterized as familial rights, children become joined with their parents and are seen as reciprocally sharing the rights of their

parents. The rights now become more than a parent's right to keep the custody of *her* child; it is also the child's right to remain in *his* family.

For this reason, some prefer to regard the parental rights doctrine as the *family's* right of autonomy, emphasizing that within the family are individual, but connected members. Children and parents are interdependent on each other, along with all other members of the intimate unit. All family members benefit from rules that provide security in the notion that the family unit means something, not only to themselves, but to the society in which they live. As a result, when laws are enacted that protect the family from needless interruption and that protect the child's relationship with his parent and siblings, the parental rights doctrine can be said to advance substantially the rights and interests of children.

Security is also furthered because children grow up in an environment in which their parents are secure knowing their parental decisions will not be subject to close scrutiny. Parents are encouraged to care for their children by giving parents maximum discretion to carry out their responsibilities free from the worry that their behavior will be monitored and second-guessed. This eliminates anxiety that would inevitably exist if parents understood that they had to justify their parental decisions to a third party. Children obviously benefit from rules that are calculated to reduce stress in their home. Protecting parental choice advances the interests of children because "[c]hildren . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control."[35]

Finally, the parental rights doctrine also keeps state officials, who will never know children better than the adults who have directly nurtured them, from making childrearing decisions. Government bureaucracies have been criticized for being inept at many functions;

childrearing, which requires exquisite attention to each child's special needs, are likely to be particularly bad at raising children. Children benefit when the important decisions concerning them are made by people they know best. Current law allows a freedom within the family for self-regulation. The degree to which children benefit from this freedom is unquantifiable; but it is reasonable to suggest that many children benefit substantially from such an arrangement.

At the same time, the parental rights doctrine frees parents to decide how much involvement in family decision making to share. In many families, children's views are solicited and taken into account when familial decisions are being made. (To be sure, in some families, too little regard for the child's views may be given; and in others, too much. The point here is not that one result will likely be achieved more often than another, or even that one result should be preferred over another; it is that the decision makers are the persons intimately connected to the children. From the child's point of view, it will often be preferred that the choice be made by parents over strangers, whether the strangers are judges, psychologists or social workers.)

But this justification can only take us so far in offering it as an advancement of a child's right. Said provocatively -- but not necessarily inaccurately -- parents are free to raise their children as they see fit even when their choices would be defended by few reputable experts as good for the child so long as the decision cannot be said to extremely bad for the child. The sought after standard is minimal fitness.

How might we express the corollary of this rule? If the parental rights doctrine is a child's right, we may begin to feel uncomfortable when we express it in unadulterated form as such. It would mean that a child has the right to be raised by parents who are minimally fit and who are likely to make significant mistakes in judgment in child rearing. How, one might reasonably ask,

can we call this kind of right any kind of right at all?

Ultimately, however, any alternative to the parental rights doctrine would empower state officials to meddle in family affairs and base their decisions on their own values and biases.[36] The parental rights doctrine protects parents from having to defend their right to their children's custody on grounds that their custody would further the children's best interests. But a best interests inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry. And it cannot be otherwise.

In 1966, the Iowa Supreme Court decided a case that has become standard fare for study in many law schools. The case, *Painter v. Bannister*,[37] involved a custody dispute between a father and the maternal grandparents of his seven-year-old son. The facts are relatively straightforward. Harold Painter and his wife, Jeanne, lived together with Mark, their only child until Jeanne was killed in an automobile accident. After her death, Harold asked his parents-in-law, the Bannisters, to care for Mark while he grieved and began to put his life back in order. After a little more than a year Harold remarried. At that time, he felt ready to resume the care of Mark. However, when he asked the Bannisters to give Mark back to him, they refused and went to court to try to keep Mark.

There were no traditional grounds on which to deny Painter the custody of his son. Mr. Painter was a fit parent who obviously loved his son. To the extent it even matters, Jeanne had expressly written in her will that she wanted Harold to raise Mark in the event of her death. Finally, Iowa law was clear that fit parents who did not abandon their children had a superior right to their children's custody over all others.

But the Iowa Supreme Court ruled that the controlling basis upon which the child's

custody would be decided was his best interests. The court relied on a recently developed theory of children's rights that unless changing custody was in their best interests, children who have "bonded" with their current caregivers should not be separated from them even to be returned to their parents.

Once the best interests test became the standard, there were no constraints on what the court would be allowed to consider as relevant. Moreover, there were no guideposts for assessing best interests. Painter, it turns out, was a hippie from Berkeley, California. His unconventional lifestyle was poorly regarded by Iowa jurists. A sometimes journalist, Painter never went to college. He made a modest income as an artist selling his work to tourists in Sausalito. He was also a struggling writer who hoped to publish a book someday. Among the various facts adduced at the custody trial which the Iowa Supreme Court saw fit to highlight was that Painter attended Jeanne's funeral wearing a "sport shirt and sweater" and that he never painted the outside of his house or cut his lawn, preferring "uncut weeds and wild oats." In contrast, the Bannisters were both college graduates. Mrs. Bannister was a librarian and Mr. Bannister was the agricultural information editor for the local university. He also served on the school board and regularly taught a Sunday school class at the local church.

The Court candidly opined that Harold would provide Mark with a more intellectually interesting life. In the court's words, "We believe it would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating." But, on balance, considering that Mark was already living with the Bannisters, the Court unanimously concluded that Mark's best interests would be served by remaining with them because they offered him greater "stability and security."

This case brilliantly demonstrates what is unleashed when courts are free to decide a case based on the judge's perception of a child's best interests. The reasoning and outcome in *Painter* are presented not to demonstrate that the case was wrongly decided. The case is described to demonstrate that one's views of a child's best interests are contingent the decisionmakers' beliefs and values and that it is impossible to separate their views from those beliefs and values.

The "standard" necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out. *Painter* demonstrates that unless judges are constrained by principles they will always be unleashing an unfettered, uncontrollable power. When we recall that the parental rights doctrine was formed in part because our constitutional scheme prohibits state officials from becoming too involved in child rearing decisions, it is especially important that judges be authorized as infrequently as necessary to decide child custody disputes based on a child's best interests.[**] The parental rights doctrine authorizes parents to raise their children as they deem appropriate even when others could reasonably disagree and claim the child's best interests would be served by a different approach.

However alluring and child-friendly the "best interests" test appears, in truth it is a formula for unleashing state power, without any meaningful reassurance of advancing children's interests at all. At the least, we can be sure it means substituting the state's preference about

---

[**] In divorce-related custody contests, courts regularly use the best interests standard. But in those cases, both parents have the equal right to the custody of the child and the court has become involved in settling their private custody dispute only because one of the parties has asked the court to arbitrate it. The text is referring to cases in which a court is empowered to deny a parent custody by awarding custody to a non-parent. Chapter will consider in greater depth the propriety of a best interests test in divorce cases.

some aspect of child rearing for the parents'. But this hardly ensures the second opinion is better than the first.

> The immutable truth of child rearing is that someone has to be in charge.
>
> It is not enough -- though it is surely right -- to affirm the human dignity of children. There is still no avoiding the fact that someone is going to make decisions about children's lives, their education, their religious training; saying it should be parents rather than bureaucrats or activists in no way makes chattel out of children, and saying it should be the State rather than parents shows no greater respect for children's dignity and autonomy.[38]

Shifting more parental decision making to state officials guarantees that someone else's childrearing values will predominate. Predictably, social conformity would replace individualism as a dominant value. The problem with "allow[ing] the government to override a parent's choice about her child's [upbringing] . . . is that, in the effort to make children more free vis-à-vis their parents, the government makes children less free in their relations with the state."[39]

To protect parents (and children) from too much intrusion by state officials, the law draws limits at the outer boundaries of acceptable parenting. Only when *no* parent is permitted to do something are state officials authorized to prevent a particular parent from exercising his or her parental rights. This translates into quite familiar rules. Consider the prohibition against neglect or abuse.

To ensure against state officials using the power to protect against neglect through open-ended value-laden judgments, "neglect" is strictly defined by state law. The draftsmen's goal in defining neglect is to proscribe parental conduct in which no one is permitted to engage without intruding into conduct that, however unacceptable it may be to some, is above the level of impermissible. This wide range of parental freedom is not tolerated to allow parents the

opportunity to inflict harm on their children (but which happens to be above the level of *impermissible* harm). But rule has this consequence. And it is for this reason that some children's rights advocates condemn the parental rights doctrine to this extent. The wide range of parental freedom is allowed for different reasons. It is the only way to constrain government from over-intrusion into the family.

Built into the parental rights doctrine, then, is that occasionally parents will be permitted to engage in conduct towards there children that many would find disagreeable and, even, unacceptable. When children's rights advocates condemn the parental rights doctrine after it has been shown to have harmed a particular child, they make a powerful, but misleading point. The powerful point is that an actual child has suffered a demonstrated harm that might have been prevented if our laws were different. The misleading point is that changing the law to try to prevent a like harm from occurring again is the appropriate solution. If the proposed change in the law were to lead to greater (albeit) different harms to children, there is no reason to be in favor of the change in the first place. But the as-applied critics of the law lack the broader perspective upon which sound public policy must be based.

In all events, the core of the parental rights doctrine guarantees children at least that the important decisions in their lives will be made by those who are most likely to know them best and to care the most for them. There may be no assurances that, in any given case, a parent will make the best choice for her child or even make a choice based on the parent's understanding of what is best for the child. But the alternative of unleashing state oversight is also unable to promise any of these things. Is this a children's rights policy? One could do worse in developing such a policy.

None of this is to say that all children are invariably well served by the parental rights doctrine. No doubt some children would be better served by being removed from their parents' custody. This certainly is true, for example when children are at risk of being seriously physically injured. Even the parental rights doctrine, however, permits intervention to protect children in such cases. To this extent, the doctrine remains consistent with children's interests. But what about when children who should be removed are not, because of a bias in favor of keeping children with their birth families? It is difficult to suggest that those children's interests are well served by the doctrine.

On the other hand, the converse is also true. A scheme that preferred too much intervention, one that required removal of children whenever there was any reason to be concerned about their well-being, would surely result in some children being needlessly harmed by the removals. Thus, an important public policy issue is where our errors should be located. No system of enforcement will be error free. No public policy should be designed with that possibility in mind. Sound policy does the opposite. It presumes errors will be made and it consciously seeks to achieve more errors of a certain kind and less of another.

Having seen that children may be harmed when they are unnecessarily removed from their families and when they are inappropriately kept there, we may be unable to resolve definitively whether or how much the parental rights doctrine advances children's interests. Though we may lack definitive proof that there is no better arrangement for children, however, most would agree there is much in the doctrine to reconcile with children's rights.

The more crucial point is that it may be misleading to suggest that the parental rights doctrine was developed for the purpose of serving children's interests. At the least, it is important

to acknowledge that the parental rights doctrine is unjustifiable *solely* in terms of the value it serves to children. The doctrine furthers vital interests of American society and may be defended on grounds outside of child-focused claims. In this sense, too successful a reconciliation of the parental rights doctrine and children's rights would tend to blur a more basic reality about the relationship of the laws affecting children and the circumstances under which they were formed. All such laws are made by adults in order to create the kind of society adults wish to have.

We simply are unable to untangle the relationship of child, parent and state from the larger matters of our culture and our core political philosophy. Although there is value in articulating the ways in which parental rights are good for children, it is important to remember that parental rights also serve important, often more basic, purposes as well.

However important the subject of children's rights may be, it is only a part of a much larger subject of what rules work best for society as a whole. Even if it could be persuasively shown that the parental rights doctrine is not best for children that should hardly condemn it. More is at stake in the parent-child relationship than what is best for children. The inquiry is obviously important, but not all consuming.

Most parents insist upon the authority to have the final say over all of the significant child rearing decisions concerning their children without having to prove to some overseer that their choices are actually best for their children. For most parents, the point is less that their choices must be *best* for their children, than that they ought not be *bad* for them. Remarkably enough, this is precisely the constitutional rule in the United States. The unfitness rule announced in *Stanley v. Illinois* means that it is wrong to have to prove that a parent has the right to custody of his or her child before showing that the child is in danger of being harmed. So, here, too, perhaps

the wiser question is whether the parental rights doctrine *harms* children, rather than whether it is best for them. For some, the lack of such definitive proof that the parental rights doctrine best serves children's interests may prove fatal. But, for others, it is sufficient that there are good reasons for the parental rights doctrine apart from what is best for children and that, absent evidence that the doctrine harms children, it should be maintained.

There is little doubt that families as an institution have survived because of their instrumental value in reproduction, acculturation, and assimilation of children. But to suggest they serve an instrumental value does not mean they are the instruments of the state. The relationship between law and culture is always inextricably intertwined. Our culture is based on a notion of privacy and private ordering, even though privacy is buttressed by state laws and rules. Our arrangement may not be "natural," or necessary. But it is ours.

References

1. The first of these quotes is from Stanley v. Illinois, 405 U.S. 645, 651 (*quoting* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (*quoting* May v. Anderson, 345 U.S. 528, 533 (1953); the second, from Troxel v. Granville, 530 U.S. 57, 65 (2000); the third, from Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

2. See 1 W. Blackstone, COMMENTARIES *447 ("the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children . . .").

3. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977).

4. JEAN ROUSSEAU, SOCIAL CONTRACT

5. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT IN POLITICAL WRITINGS OF JOHN LOCKE (David Wooton ed., 1993) (1681) §§ 131, 135, 149, 168, 172. "Parents in Societies, where they themselves are Subjects, retain a power over their children, and have as much right to their subjection, as those who are in the state of Nature." JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, § 57 (B. Blackwell, Oxford, 1946).

6. I recognize that scholars debunk the idea of the naturally ordered private sphere of family life. *See*, *e.g.*, Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L.

REFORM 835, 838 (1985). *See also*, Laurence D. Houlgate, *What is Legal Intervention in the Family? Family law and Family Privacy* 17 LAW AND PHILOSOPHY 141 1998).

7. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

8. Meyer v. Nebraska, 262 U.S. 390 (1923)

9. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

10. *Id.* at 535.

11. "Parental right of control serves the interests of all citizens in preserving a society in which the state cannot dictate that children be reared in a particular way. If the state could control the upbringing of children, it could impose an orthodoxy by indoctrinating individuals during the formative period of their lives." *Developments in the Law: Family Law,* 93 HARV. L. REV. 1156, 1354 (1980).

12. The state will never tolerate the teaching of ideas it considers anathema. But what is anathema to state officials one day may become dogma the next.

13. Skinner v. Oklahoma, 316 U.S. 535 (1942)

14. 381 U.S. 479 (1965).

15. Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (*quoting* Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

16. 405 U.S. 438 (1972).

17. 410 U.S. 113 (1973).

18. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974).

19. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

20. 388 U.S. 1 (1967).

21. Stanley v. Illinois, 405 U.S. 645 (1972).

22. 530 U.S. 57 (2000).

23. Lawrence v. Texas, 123 S.Ct 2472 (June 26, 2003).

24. David A.J. Richards, *The Individual, The Family, and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980).

25. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371-73 (1994); PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 168 (1997).

26. "Some kind of answer to the question Where do I belong? is necessary for an answer to the question Who am I?" Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 636 (1980).

27. "Children are valued not only for themselves, but as living expressions of their parents' love for each other." *Id.* at 640 n. 88 (*citing* Blustein, *Child Rearing and Family Interests*, in HAVING CHILDREN 155, 188 (O. O.Neill & W. Ruddick eds. 1979)).

28. Peggy Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1363 (1994).

29. *Id.* at 1363 (*quoting* Orlando Patterson, SLAVERY AND SOCIAL DEATH 5 (1982).)

30. *Id.* at 1371.

31. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 85 (J.W. Gough ed. 1947) (1st ed. London 1690).

32. *See*, *e.g.*, GARY S. BECKER, A TREATISE ON THE FAMILY 37-38 (1991); JOHN H. BECKSTROM, SOCIOBIOLOGY AND THE LAW 81-102, 130- 34 (1985). *See also* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2433-36 (1995).

33. Parham v. J.R., 442 U.S. 548, 602 (1979).

34. *See* Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 487 (1989) ("It is now a familiar idea in political as well as social theory that people need communities, and that social life is both natural and essential for human beings.")

35. Goldstein1979, p. 25.

36. *See*, *e.g.*, JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 49-52 (1973) Robert Mnookin, *Foster Care--In Whose Best Interests?*, 43 HARV. EDUC. REV. 599, 613-22 (1973).

37. 140 N.W.2d 152 (Iowa 1966).

38. Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 132 (2000).

39. JOHN GARVEY, WHAT ARE FREEDOMS FOR? 122 (1996)